BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY HARRIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,993
VYNE WEST ASSISTED LIVING	)	
Respondent	)	
AND	)	
	)	
AMCO INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 11, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a July 17, 1998 accident and the alleged resulting injury to the low back. Judge Barnes awarded claimant a two percent permanent partial general disability after finding that claimant's whole body functional impairment increased by that amount as a result of the accident.

Claimant contends that Judge Barnes erred by adopting Dr. Davis' opinion that claimant now has a four percent whole body functional impairment, two percent of which preexisted the accident. Claimant argues that Dr. Davis' rating does not conform with the

fourth edition of the AMA *Guides to the Evaluation of Permanent Impairment* (the *Guides*). In short, claimant contends the *Guides* rate her impairment at 10 percent.

Conversely, respondent and its insurance carrier contend that claimant sustained no additional functional impairment as a result of the July 1998 accident as she had low back, right hip, right leg, and right foot symptoms before that accident. Alternatively, respondent and its insurance carrier request the Award be affirmed.

The only issue before the Appeals Board on this review is: What additional functional impairment, if any, did claimant sustain as a result of the July 17, 1998 accident?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On July 17, 1998, claimant injured her low back when she caught one of respondent's residents, preventing him from falling. At the time of the incident, claimant experienced a popping sensation and pain in her right lower back and pain down the back of both legs. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent, who operates an assisted living facility.

2. Claimant initially received medical treatment from her personal physician, Dr. Steve K. Couch. Later, she received treatment from Dr. Ronald Davis, Dr. Jacob Amrani, and Dr. James R. Hay. At her attorney's request, claimant also saw Dr. Pedro A. Murati to be evaluated for purposes of this workers compensation claim.

3. At the time of the February 28, 2000 regular hearing, claimant continued to work for respondent despite ongoing symptoms. At the regular hearing, claimant described her symptoms, as follows:

> Lots of pain, it's hard to bend, I'm still having numbness and burning and hurting in my legs. I went to third shift from second shift, because I could no longer walk that much and push the med cart without having lots of pain in my lower back and legs, and that's about it.[1]

4. Before the July 1998 incident, claimant had a history of back complaints. Before working for respondent, claimant worked at a nursing home as a CNA, a job in which she generally experienced aches and pains in her back. On May 9, 1997, claimant visited the office of her personal physician, Dr. White, complaining of right leg and hip pain and tingling down her right leg. In May 1997, claimant received an injection after being diagnosed as having an inflamed nerve and radiculopathy in the right leg.

---

[1] Regular Hearing, February 28, 2000; p. 8.

On April 16, 1998, claimant saw another of her personal physicians, Dr. Couch, complaining of right hip and right low back pain. X-rays were then taken that indicated spondylolisthesis of L4 and L5 and significant degenerative changes in the lower lumbar spine.

5. Dr. Couch, who is board certified in family practice, testified that he has limited experience determining functional impairment ratings. But based on his review of the *Guides,* Dr. Couch believes that claimant had a five percent whole body functional impairment for her low back condition before the July 1998 accident and a 10 percent whole body functional impairment after the accident. Dr. Couch was the only physician who testified who treated claimant both before and after the July 1998 accident.

6. Dr. Davis, who is board certified in family practice and occupational medicine, treated claimant from August 26, 1998, through April 8, 1999. He diagnosed acute lumbar back sprain and right leg pain.

In September 1998, Dr. Davis ordered an MRI. That study indicated that claimant had degenerative changes and degenerative disk disease especially at L4-5 and L5-S1, anterolisthesis at L4-5 with associated disk bulge and hypertrophy of the facets, mild to moderate spinal canal and moderate bilateral neural foramina narrowing, and a left lateralizing disk bulge at L5-S1.

Dr. Davis rated claimant's functional impairment at four percent, two percent of which preexisted the July 1998 accident. But the doctor acknowledged that he classified claimant as a DRE (Diagnosis-Related Estimates) Lumbosacral Category II, which the fourth edition of the *Guides* rates as a five percent whole body functional impairment. When asked why he rated claimant at four percent rather than at five percent as suggested by the *Guides*, the doctor stated that he used the *Guides* as a guide and that he used his own judgment in assessing claimant's impairment. The doctor testified:

> Q. (Mr. Slape) Doctor, one final item, if I may. In reviewing page 102 of the Fourth Edition under the D.R.E. Category II, I see that there's a 5 percent listed at the bottom, and I was curious as to why your opinion expressed here today was a 4 percent opinion. Can you help me out with that?
>
> A. (Dr. Davis) Did you state in her D.R.E. Lumbosacral Category II?
>
> Q. Yes.
>
> A. Well, the title of this is guide, and that's what it is. The final decision I would -- is judgment. The final decision would be judgment. So that was using this as a guide and using my judgment, that was my assessment.

> Q. But in any event, it is your testimony that she is a D.R.E. Lumbosacral Category II; correct?
>
> . . .
>
> A. Yes, I classified Mary as a D.R.E. Lumbosacral Category II. Yes, sir.[2]

Dr. Davis also placed a 60-pound lifting restriction on claimant but stated that restriction was needed because of her pre-accident back condition.

7. Dr. Murati examined claimant on June 10, 1999. At that time, claimant's chief complaints were low back pain, right leg pain, and numbness in the right foot. Based upon the examination and a review of claimant's medical history and diagnostic films, Dr. Murati diagnosed (1) lumbosacral strain with bilateral radiculopathy, (2) anterolisthesis with bulging at L4-5, and (3) morbid obesity.

According to Dr. Murati's interpretation of the fourth edition of the *Guides,* claimant falls in category III of the DRE lumbosacral categories, which carries a 10 percent whole body functional impairment rating. The doctor did not believe that claimant had any functional impairment before the July 1998 accident. He testified, as follows:

> Q. (Mr. Slape) Doctor, given those medical records and the information contained therein, including the patient's complaints as well as the treatment, is there any portion of the 10 percent whole person impairment listed by you, in your opinion, is there any portion of that that you would attribute to this lady's preexisting condition or complaints prior to her accident date in July of 1998?
>
> A. (Dr. Murati) No.
>
> Q. And why is that?
>
> A. Well, because it's -- there's no permanent issue here. She had some temporary complaints on occasional doctor visits. The doctor never placed any type of restrictions on her on a permanent basis. Therefore, there is no permanent impairment.[3]
>
> . . .

---

[2] Deposition of Ronald Davis, M.D., March 2, 2000; pp. 23, 24.

[3] Deposition of Pedro A. Murati, M.D., December 9, 1999; pp. 11, 12.

> Q. (Mr. Liby) So what about that -- well, let's just leave it at this: You are assuming the fact that she didn't go to the doctor more, you conclude from that that the condition must have resolved?
>
> A. That's not just the only thing I use in my reasoning. She is working in a very hard work, which actually has been cited by OSHA as being one of the worse [sic] things to do, high-risk areas for injuries. She is moving and transferring patients and she has no complaints. I am assuming she had good job reviews from her supervisors. I mean, therefore, apparently she did not have a condition that would alter her activity of daily life. Therefore, she did not have a permanent impairment.[4]

But Dr. Murati admits that he did not have claimant's medical records from Dr. Couch when he examined claimant. Further, the doctor did not know that claimant was diagnosed with radiculopathy in May 1997; did not know that x-rays taken in April 1998, only three months before the work-related incident, showed significant degenerative changes in the lumbar spine; and probably did not know that on September 1, 1998, claimant gave a history to the Via Christi Regional Medical Center physical therapy department that she was having constant pain, which she rated as four on a 10-point scale, even before the work-related accident.

8. At Dr. Davis' deposition, claimant entered without objection page 102 of the fourth edition of the *Guides.* That page of the *Guides* defines the various lumbosacral categories and indicates that one of the principal differences between lumbosacral categories II and III is the existence of radiculopathy:

> **DRE Lumbosacral Category II: Minor Impairment**
>
> *Description and Verification:* The clinical history and examination findings are compatible with a specific injury or illness. The findings may include significant intermittent or continuous muscle guarding that has been observed and documented by a physician, nonuniform loss of range of motion (dysmetria, differentiator 1, Table 71, p. 109), or nonverifiable radicular complaints. There is *no* objective sign of radiculopathy and *no* loss of structural integrity. See Table 71, differentiator 1 (p. 109).
>
> *Structural Inclusions:* (1) Less than 25% compression of one vertebral body; (2) posterior element fracture *without* dislocation (not developmental spondylolysis); the fracture is healed, and there is no loss of motion segment integrity.

---

[4] Deposition of Pedro A. Murati, M.D., December 9, 1999, pp. 17, 18.

A spinous or transverse process fracture with displacement without a vertebral body fracture is a category II impairment because it does not disrupt the spinal canal.

Impairment: 5% whole-person impairment.

DRE Lumbosacral Category III: Radiculopathy

Description and Verification: The patient has significant signs of radiculopathy, such as loss of relevant reflex(es), or measured unilateral atrophy of greater than 2 cm above or below the knee, compared to measurements on the contralateral side at the same location. The impairment may be verified by electrodiagnostic findings. See Table 71, p. 109, differentiators 2, 3, and 4.

Structural Inclusions: (1) 25% to 50% compression of one vertebral body; (2) posterior element fracture, but *not* fracture of transverse or spinous process, *with* displacement disrupting the spinal canal, healed without loss of structural integrity. Radiculopathy may or may not be present.

Differentiation from congenital and developmental conditions may be accomplished by examining preinjury roentgenograms or a bone scan performed after onset of the condition.

Impairment: 10% whole-person impairment.

9. The Appeals Board is persuaded by Dr. Couch's opinions and, therefore, finds that claimant has sustained an additional five percent whole body functional impairment as a direct result of the July 1998 work-related accident. The Appeals Board finds Dr. Couch's opinions the most credible for two reasons. First, Dr. Couch was the only physician who testified who treated claimant both before and after the July 1998 accident. Second, Dr. Couch's functional impairment rating opinions appear more in line with the AMA *Guides* than those provided by Doctors Davis and Murati. The Appeals Board concludes that claimant had a five percent whole body functional impairment due to her back before the July 1998 accident and a 10 percent whole body functional impairment after that accident.

10. Following the accident, claimant returned to work for respondent at a comparable wage.[5]

[5] Claimant's Brief to the Appeals Board, p. 2.

CONCLUSIONS OF LAW

1. The Award should be modified to grant claimant a five percent permanent partial general disability.

2. Because a back injury is an "unscheduled" injury, permanent partial general disability is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

As indicated above, claimant has returned to work for respondent at a comparable wage. Therefore, claimant's permanent partial general disability is limited to the functional impairment rating.

3. As provided by the Workers Compensation Act, a worker may only recover an award for increased impairment or disability.[6] The Act provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Applying that provision of the Act, claimant is entitled to receive permanent partial general disability benefits for the increased functional impairment of five percent that was caused by the July 1998 accident.

---

[6] K.S.A. 1998 Supp. 44-501(c).

4. The Appeals Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the May 11, 2000 Award and increases the permanent partial general disability award to five percent.

Mary Harris is granted compensation from Vyne West Assisted Living and its insurance carrier for a July 17, 1998 accident and resulting disability. Based upon an average weekly wage of $491.72, Ms. Harris is entitled to receive 20.75 weeks of permanent partial general disability benefits at $327.83 per week, or $6,802.47, for a five percent permanent partial general disability, making a total award of $6,802.47, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts all orders set forth in the Award that are not inconsistent with the above. Additionally, claimant is awarded all reasonable and necessary authorized medical benefits.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Richard J. Liby, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director